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SUPREME COURT, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEBORAH A. MAYS, PETITIONER,

v.

CITY OF TAMPA, RESPONDENT

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED

A. The district court denied Petitioner leave to amend her complaint to add a claim for pregnancy discrimination under Title VII, 42 U.S.C §2000e-2(a). The district court continued to maintain that the pregnancy discrimination claim was untimely filed with the EEOC, in complete disregard of a letter from the EEOC acknowledging that Petitioner had raised the issue of pregnancy discrimination when she initially filed a previous charge of discrimination, accepting the blame for not addressing that charge in their initial investigation, and correcting the record as to the timeliness of Petitioner's pregnancy discrimination charge. The Eleventh Circuit Court of Appeals, in a per curiam decision, sanctioned the district court's error by holding that the information the district court had at that time indicated that the pregnancy discrimination claim Petitioner sought to include in her amended complaint was untimely, and that even if the district court's decision was in error, the error was harmless because this claim was ultimately decided by the district court, when in fact, the district court did not ultimately decide the pregnancy discrimination claim.

The questions presented by these facts are:

1. Whether the Eleventh Circuit's decision contradicts EEOC rules and creates multiple conflicts with the Eleventh Circuit's own prior decisions as well as with other Courts of Appeals' decisions.

2. Whether the Eleventh Circuit's decision has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the district court, as to call for this Court's exercise of supervisory power if the district court used clearly erroneous facts to deny a motion to amend and dismissing a claim.

B. While Petitioner was still on leave of absence, Respondent gave Petitioner an unwarranted poor performance evaluation. According to Respondent's Procedures and Standards, an employee's inability to perform up to accepted work standards constitutes grounds for dismissal and can affect the employee's merit increase eligibility, as well as eligibility for future promotional opportunities and can lead to dismissal from employment. Petitioner's performance evaluation was not done in accordance with the Respondent's Rater's

Manual in that during the evaluations period, the job functions on which Respondent rated Petitioner below expectations were not part of Petitioner's specific job functions. The following material facts were disputed: whether the Respondent assigned Petitioner more work than other employees similarly situated; what constituted the essential functions of Petitioner's position; whether all Office Support Specialist II employees were required to perform all nine different types of tasks on any given work day; and whether telephone duties were only a marginal aspect of Petitioner's job functions.

The district court granted Respondent's motion for summary judgment on the basis that Petitioner's poor performance evaluation and the amount of work she received did not constitute adverse employment action. The Eleventh Circuit upheld the district court's decision and further reasoned that because Petitioner "was unable to perform her telephone duties and because her doctor ordered that she remain off her feet, she could not perform all of the tasks required of her position."

The questions presented by these facts are:

3. Whether the Eleventh Circuit's decision contradicts its own prior decisions and whether this Court should resolve the conflict it creates with other Courts of Appeals' decisions on the same issue.

4. Whether the decision has so far departed from the accepted and usual course of judicial proceedings, in that it violates every principle of statutory and constitutional standards for judicial review of a grant of summary judgment, so as to call for an exercise of this Court's supervisory power.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished. The opinions of the United States District Court appear at Appendix B and C to the petition and are unpublished.

JURISDICTION

The judgment of the Court of Appeals was entered on May 23, 2003. No petition for rehearing was filed in this case. This Court's jurisdiction is invoked under 28 U.S.C. §1254(l).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Americans with Disabilities Act, 42 U.S.C. §12101-12213, and of the Pregnancy Discrimination Act, Title VII, 42 U.S.C. §2000e, *et seq.*, together with the relevant portions of the regulations implementing those statutes, are reproduced at Appendix O and P to the petition.

STATEMENT OF THE CASE

Petitioner filed two different charges of employment discrimination with the EEOC. Charge number 151 A0 1079 (hereinafter Charge #1) was filed on April 10, 2000. App. O. Among the allegations raised by Petitioner were allegations of pregnancy discrimination. However, through administrative error, the EEOC failed to appropriately annotate the allegations on the face of the initial charge. Charge number 151 A1 0131 (hereinafter Charge #2) was filed at a later date.

On August 16, 2000, the EEOC issued a Notice of Right to Sue on Charge #1. App. G. Pursuant to that notice, Petitioner timely filed her initial judicial complaint on October 23, 2000. In that complaint, Petitioner alleged

violations of the Americans With Disabilities Act of 1990, 42 U.S.C. §§12101-12213 and of Chapter 760, Florida Statutes.

On December 8, 2000, the EEOC issued a Dismissal and Notice of Rights in Charge #2, determining that it cannot investigate Petitioner's charge because it was not filed within the 300-day time limit required by law. App. H. Petitioner appealed the dismissal and asserted that the allegations contained in that charge had initially been raised in Charge #1, but through administrative error, the EEOC had not placed them on the face of the charge. Upon review of the appeal, the EEOC concluded that the allegations were indeed initially raised with the filing of Charge #1, but through administrative error, the EEOC failed to appropriately annotate the allegations on the face of Charge #1. On December 14, 2000, the EEOC revoked the dismissal and reopened the charge for investigation, concluding that the charge was therefore, timely filed. App. I. On March 19, 2001, the EEOC issued a Notice of Right to Sue on Charge #2. App. J. On June 1, 2001, Petitioner filed a timely motion for leave to amend her initial complaint to add a claim of pregnancy discrimination and retaliation under Title VII, of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et*

seq., and a claim of discrimination and retaliation under the Family Medical Leave Act, 28 U.S.C. §2601 *et seq.*

On June 22, 2001, the district court denied Petitioner leave to amend, on the grounds that Petitioner's amendment would be futile because Petitioner's EEOC charge was untimely filed. App. F, p. 2. Prior to denying Petitioner leave to amend her complaint, the district court was provided with all of the notices described above. Petitioner filed a motion to reconsider and provided the district court once more with the notices from the EEOC, bringing to the district court's attention the oversight it had committed. The district court denied Petitioner's motion to reconsider. App. D. Yet, the Eleventh Circuit upheld the denial of leave to amend on the basis that "the information the district court had at that time indicated that the pregnancy discrimination claim she sought to include in her amended complaint was untimely." App. A, p. 10. The Eleventh Circuit further found that "even if the district court's decision to deny Mays's motion to amend her complaint to include a pregnancy discrimination claim was in error, such error was harmless because this claim ultimately was decided by the district court.

The district court also held that Petitioner's EEOC charge did not encompass such claims as Petitioner's disability discrimination harassment, reasonable accommodations claims, as well as her constructive discharge claims because these claims are not reasonably related to her disability discrimination charges contained in her EEOC charge.

While Petitioner was still on leave of absence, Respondent gave Petitioner an unwarranted poor performance evaluation. According to Respondent's Procedures and Standards, an employee's inability to perform up to accepted work standards constitutes grounds for dismissal and can affect the employee's merit increase eligibility, as well as eligibility for future promotional opportunities and can lead to dismissal from employment. App. K, p.4; App. L; App. M, p. 1. Petitioner's performance evaluation was not done in accordance with the Respondent's Rater's Manual in that during the evaluations period, the job functions on which Respondent rated Petitioner below expectations were not part of Petitioner's specific job functions.

There were disputed facts on whether the Respondent assigned Petitioner more work than other employees similarly situated. There were also disputed facts about

what constituted the essential functions of Petitioner's position, and as to whether all Office Support Specialist II employees were required to perform all nine different types of tasks on any given work day. The facts were disputed as to whether telephone duties were a marginal aspect of Petitioner's job functions. App. N, pp. 2-9.

The district court held that Petitioner's poor performance evaluation and the amount of work she received did not constitute adverse employment action and entered summary judgment in favor of Respondent. The Eleventh Circuit upheld the district court's ruling and further reasoned that because Petitioner "was unable to perform her telephone duties and because her doctor ordered that she remain off her feet, she could not perform all of the tasks required of her position."

REASONS FOR GRANTING THE PETITION

This Court should review the Eleventh Circuit's decision because it creates multiple conflicts with other courts of appeals and contradicts EEOC rules.

The district court denied Petitioner leave to amend to add her pregnancy discrimination claim on the basis that the amendment would be futile because Petitioner's

EEOC charge was untimely filed. App. F. The Eleventh Circuit affirmed that denial on the basis that "the information the district court had at that time indicated that the pregnancy discrimination claim she sought to include in her amended complaint was untimely. App. A, p.10.

That finding is squarely in conflict with prior Eleventh Circuit cases on the same issue. In *Wilkerson v. Grinnell Corp.*, 270 F.3d 1314 (11th Cir. 2001), the Eleventh Circuit recognized that Title VII grants the EEOC "broad discretion to determine in what form a charge must come and what information it must contain." *Wilkerson,*citing 42 U.S.C. § 2000e-5(b) (1994) and *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1240 (11th Cir. 1989). The Eleventh Circuit also recognized that Title VII mandates only that a charge be verified and in writing. *Id.*, citing 42 U.S.C. § 2000e-5(b) (1994). In another case, the Eleventh Circuit went even further and held that the EEOC can investigate a charge even if it is untimely. *See EEOC v. Tire Kingdom, Inc.*, 80 F.3d 449 (11th Cir. 1996. Therefore, the Eleventh Circuit's complete disregard for the EEOC's letter dated December 14, 2000 is greatly inconsistent with these prior decisions and contravenes the EEOC's purpose and reason for being.

29 C.F.R. §1601.6 states that the EEOC "shall receive information concerning alleged violations." 29 C.F.R. §1601.6(a) (2000). "Where the information discloses that a person is entitled to file a charge," the EEOC may assist in the filing of the charge. According to the regulations, charges "should contain" certain information. 29 C.F.R. § 1601.12(a) (2000). If a charge does not contain the suggested information, the EEOC will deem a charge minimally sufficient when it receives from the charging party "a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b) (2000). A charge may be amended to cure technical defects, to clarify or amplify allegations, or to allege additional unlawful acts. *See Id.* The requirements for a charge are, indeed, "very minimal." *EEOC v. Mississippi College*, 626 F.2d 477, 483 (5th Cir. 1980).

Such is the case here. Petitioner provided sufficient information to the EEOC for it to deem the charge timely filed. The EEOC failed to include that information and acknowledged this mistake in a letter. App. I. After it recognized its mistake, the EEOC reopened the charge for investigation and later issued a Notice of Rights to Sue based on the merits of the charge. App. I.

The Eleventh Circuit's decision also creates a conflict with other circuits that have held that a district court erred in dismissing a plaintiff's Title VII claim based on the EEOC's oversight. *See Walker v. United Parcel Service, Inc.*, 240 F.3d 1268 (10th Circuit 2001).

If this Court does not review this case, Title VII's provisions and the EEOC will be virtually abrogated since it would set a precedent where a court can ignore determinations issued by the EEOC. It would thwart the intent of the statutory scheme that created the EEOC and it would eliminate the effectiveness of the EEOC as the agency in charge of investigating the charges. Furthermore, it would operate as a denial of due process to individuals such as Petitioner, who would be deprived of their rights because of errors committed by the EEOC.

This Court should also review this case because disregarding the EEOC letter acknowledging the EEOC's mistake would lead to unjust results for individuals such as Petitioner because their cases would never have the opportunity to have their day in court on their merits. This would contravene the mandates of Rule 15, Federal Rules of Civil Procedure, which require liberal amendment to the pleadings to avoid this type of injustice.

The Eleventh Circuit's decision is also inconsistent with its prior decision where it held that the limitations period can be equitably tolled if the EEOC issues a second notice pursuant to a reconsideration on the merits of the charge. *See Santini v. Cleveland Clinic,* 232 F.3d 823 (11th Cir. 2000), *citing Zillyette v. Capital One Fin. Corp.,* 179 F.3d 1337, 1339-41 (11th Cir.1999); *Gitlitz v. Compagnie Nationale Air France,* 129 F.3d 554, 557 (11th Cir.1997). In this case, the second Notice of Rights to Sue issued on March 19, 2001, was clearly on the merits of Petitioner's charge. The first document was a dismissal of the charge without investigation of its merits.

The district court also held that the EEOC charge filed by Petitioner did not encompass such claims as disability harassment, reasonable accommodations and constructive discharge. App. B, p.6. This ruling creates conflict with the Eleventh Circuit's own well established precedents as well as established decisions in various other circuits, which state that the "beginning point for determining the permissible scope of the judicial complaint is the EEOC charge and investigation. *See Eastland v. Tennessee Valley Authority,* 714 F.2d 1066, 1067 (11th Cir. 1983); *see also Evans v. U.S. Pipe & Foundry Co.,* 696 F.2d 925, 927 (11th Cir. 1983); *Schnellbaecher v. Baskin Clothing Co.,* 887 F.2d 124, 127

(7th Cir. 1989) ("[A]llowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would circumvent the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge, as surely as would an initial failure to file a timely EEOC charge.") (quotation omitted).

The Eleventh Circuit's decision also creates conflict with its own case, and with other circuits, which recognize that under the "like or related" rule, the "scope" of the judicial complaint is limited to the "scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *See Mulhall v. Advance Sec. Inc.*, 19 F.3d 586, 589 n.8 (11th Cir. 1994). However, the district court ignored the fact that the EEOC admitted that the initial charge of discrimination included claims of pregnancy discrimination. Therefore, necessarily, the investigation of Petitioner's initial charge would have included the pregnancy discrimination issues. Consequently, Petitioner did not have to seek to have the court determine that these charges "grew out" of those stated in her first charge of discrimination.

The Eleventh Circuit further ruled that "even if the district court's decision to deny Mays's motion to amend her complaint to include a pregnancy discrimination claim

was in error, such error was harmless because this claim ultimately was decided by the district court." App.A, p. 11. That ruling constitutes a departure from the accepted and usual course of judicial proceedings because it leads to an absurd result. Even if the district court decided the pregnancy discrimination claim, it did so only in the context of the ADA, and not in the context of Title VII. Furthermore, it did so in a motion for summary judgment, without affording Petitioner the benefit of discovery. Note that it was after August 22, 2002, that the district court finally allowed Petitioner to assert replead her complaint. Even then, the district court restricted Petitioner to "only those claims that are reasonably related to her EEOC charge, namely, her disability discrimination claims under the ADA and the FCRA as they relate to her hearing impairment and her retaliation claims under Title VII." App. C, p.8. The district court specifically excluded any claim Petitioner may have related to her pregnancy.

Another compelling reason for granting this petition is that the court's ruling is a complete departure from the accepted and usual course of judicial proceedings, where parties are afforded discovery in accordance with the Federal Rules of Civil Procedure. In this case, Petitioner was not afforded the opportunity to conduct discovery on

the pregnancy aspect of her ADA claim. Before the August 22, 2002, order, the district court consistently denied Petitioner the opportunity to add that pregnancy claim, even in the context of the ADA. In the August 22, 2002 order, the district court restated its prohibition against any new discovery. App. C, p. 8. The Eleventh Circuit has in fact abrogated Petitioner's right to discovery. The opportunity for discovery is a question of national importance.

If the Court does not review this case, the Eleventh Circuit's decision will have a destructive effect on not only the established principles of discovery, but also on the established principles of pleading a complaint, as found in Rule 8, Federal Rules of Civil Procedure. This will occur because by not allowing Petitioner the opportunity to conduct discovery, the district court and the Eleventh Circuit have ruled on the Respondent's motion for summary judgment, which is tantamount to ruling on their motion to dismiss while using a summary judgment standard. The district court and the Eleventh Circuit have effectively applied the *McDonnell Douglas* framework to the pleadings. This is in direct conflict with this Court's previous holding in *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), where the Court held that:

An employment discrimination complaint need not contain specific facts establishing a prima facie case under the *McDonnell Douglas* framework, but instead must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. Rule Civ. Proc. 8(a)(2). The *McDonnell Douglas* framework--which requires the plaintiff to show (1) membership in a protected group, (2) qualification for the job in question, (3) an adverse employment action, and (4) circumstances supporting an inference of discrimination--is an evidentiary standard, not a pleading requirement. See, *e.g.*, 411 U.S. at 800. The court has never indicated that the requirements for establishing a prima facie case apply to pleading. Moreover, the *McDonnell Douglas* framework does not apply where, for example, a plaintiff is able to produce direct evidence of discrimination. See *Trans World Airlines, Inc.* v. *Thurston,* 469

U.S. 111, 121. Under the Second Circuit's heightened pleading standard, however, a plaintiff without direct evidence at the time of his complaint must plead a prima facie case of discrimination even though discovery might uncover such direct evidence. It seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered. Moreover, the precise requirements of the prima facie case can vary with the context and were "never intended to be rigid, mechanized, or ritualistic." *Furnco Constr. Corp.* v. *Waters,* 438 U.S. 567, 577. It may be difficult to define the precise formulation of the required prima facie case in a particular case before discovery has unearthed relevant facts and evidence. Consequently, the prima facie case should not be transposed into a rigid pleading standard for discrimination cases.

> Imposing the Second Circuit's heightened standard conflicts with Rule 8(a)'s express language, which requires simply that the complaint "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley* v. *Gibson,* 355 U.S. 41, 47. A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Hishon* v. *King & Spalding,* 467 U.S. 69, 73. Petitioner's complaint easily satisfies Rule 8(a)'s requirements because it gives respondent fair notice of the basis for his claims and the grounds upon which they rest. In addition, it states claims upon which relief could be granted under Title VII and the ADEA. Thus, the complaint is sufficient to survive respondent's motion to dismiss. Pp. 3-9.

See also Conner v. Reckitt & Colman 84 F.3d 1100 (8th Cir. 1996) (summary judgment is inappropriate when discovery is not completed); *Hispanics for Fair and*

Equitable Reapportionment v. Griffin , 958 F.2d 24, 25 (2d Cir. 1992) (per curiam) (summary judgment should not be granted . . . unless the losing party has been given an opportunity to demonstrate that there are genuine material issues for trial.)

In this case, the district court had consistently denied Petitioner leave to amend her complaint and add her pregnancy discrimination claim. When it finally directed Petitioner to amend her claim, and even then, the district court restricted this to only claims related to the hearing impairment, the discovery deadline was already passed and the district court reiterated its prohibition against any further discovery. Therefore, all the facts that were submitted as in relation to the motion for summary judgment, even the disputed facts, were related only to the Petitioner's "hearing impairment" rather than to the pregnancy issues. These are the facts that the district court considered and that the Eleventh Circuit sanctioned as the basis for dismissal of Petitioner's claims of pregnancy discrimination.

Petitioner had the burden, as part of her prima facie case of discrimination, to prove adverse employment action. Part of the evidence presented by Petitioner was that Respondent gave Petitioner an unwarranted poor

performance evaluation. The district court held that the poor performance evaluation did not constitute adverse employment action. The Eleventh Circuit's conflicts with its own precedent, as found in *Wideman v. Walmart Stores, Inc.,* 141 F.3d 1453, 1456 (11th Cir. 2001), which held that "Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions."

This holding is also in direct conflict with other circuit courts decisions on the same issue. *See Ledergerber v. Stangler,* 122 F.3d 1142, 1144 (8th Cir.1997) (only adverse employment actions that "rise to the level of an ultimate employment decision [are] intended to be actionable under Title VII."). The First, Ninth, and Tenth Circuits have all held that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions. *See Wyatt v. City of Boston,* 35 F.3d 13, 15-16 (1st Cir.1994) (actions other than discharge are covered by Title VII's anti-retaliation provision, for example "employer actions such as demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees.") (internal citation omitted); *See also Yartzoff v. Thomas,* 809 F.2d 1371, 1375 (9th Cir.1987)

(that such non-ultimate employment decisions as "[t]ransfers of job duties and undeserved performance ratings, if proven, would constitute "adverse employment decisions' cognizable under" Title VII's anti-retaliation provision); *Berry v. Stevinson Chevrolet,* 74 F.3d 980, 984-86 (10th Cir.1996) (construing Title VII's anti-retaliation provision to reach beyond ultimate employment decisions and protect an employee from a malicious prosecution action brought by former employer). The D.C. Circuit also held that the Age Discrimination in Employment Act's anti-retaliation clause, which is identical to Title VII's, "does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion." *Passer v. American Chem. Soc'y,* 935 F.2d 322, 331 (D.C.Cir.1991). *See also, Welsh v. Derwinski,* 14 F.3d 85, 86 (1st Cir.1994) (stating that the ADEA's anti-retaliation provision covers more than discharge, demotion, or failure to promote and that a "case by case review" is necessary to determine whether an employer's actions rise to the level of adverse employment actions for purposes of stating a prima facie case of retaliation).

There is a national interest in having circuit courts of appeals rule consistently with their prior decisions.

United States case law has evolved over the years on that same principle. If a court wants to recede from its prior position, it must do so clearly on the record, otherwise, its decisions are governed by binding precedent. Consistent with its prior decisions, the Eleventh Circuit properly analyzed the issue of adverse employment action in *Doe v. DeKalb County School District,* 145 F.3d 1441, (11th Cir. 1998), as follows:

> Under the ADA, no covered employer may discriminate against a qualified person because of his disability. *See* 42 U.S.C. § 12112(a). More specifically, no covered employer may use the disability of an otherwise qualified person as an excuse for discrimination in hiring, promotion, discharge, compensation, training, or "other terms, conditions, and privileges of employment." *Id.* Thus, the ADA prohibits "a broad variety of adverse employment actions, whenever those actions are taken for a prohibited reason." *McNely v. Ocala Star-Banner Corp.,* 99 F.3d 1068, 1077 (11th Cir.1996). Although we have never

> thoroughly examined what constitutes "adversity," we have held that a transfer may sometimes constitute an adverse action under the ADA, *see id.* at 1078.

However, in this instant case, the Eleventh Circuit departed from its prior binding precedent in holding that Petitioner's poor unwarranted performance evaluation did not constitute adverse employment action.

This Court should also review the Eleventh Circuit's decision because it is a departure from the well established standard for deciding a motion for summary judgment. Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). If there are issues of fact on an element of the prima facie case., a motion for summary judgment must be denied. *See EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico,* 279 F.3d 49 (1st Cir. 2002). In a motion for summary judgment, the facts must be taken in the light most favorable to the non-moving party. *Sweat v. Miller Brewing Co.,* 708 F.2d 655 (11th Cir. 1983). Yet, in this case, the district court and the

Eleventh Circuit, construed the facts in the light most favorable to the moving party, and not to the non-moving party. The district court relied on the fact asserted by the moving party to make a finding of no genuine issue of material fact. For example, the district court stated that "Plaintiff cannot prove that she is a "qualified individual with a disability" because she could not perform the essential function of her position." Yet, the court ignored Petitioner's version of the facts, that was heavily disputed on that material issue of fact. See App. N, pp.2-9, showing that the district court had before it specific parts of Petitioner's deposition where Petitioner heavily disputed these material facts.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Deborah A. Mays, Petitioner, *Pro Se*
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Tampa, FL 33686
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10-24-03
Date

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEBORAH A. MAYS, PETITIONER,
v.
CITY OF TAMPA, RESPONDENT

CERTIFICATE OF SERVICE

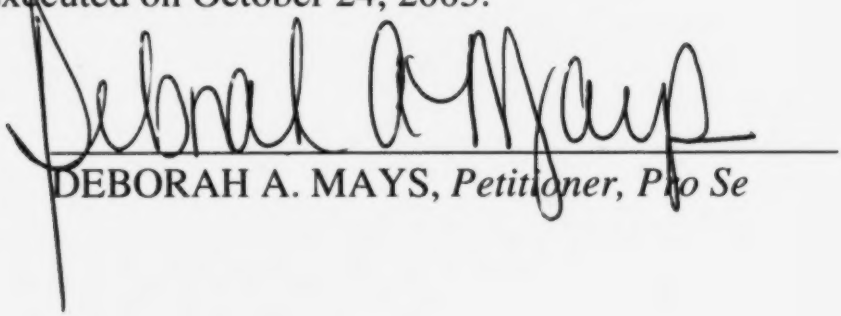
I, DEBORAH A. MAYS, do swear or declare that on this date, October 24, 2003, as required by Supreme Court Rule 29, I have served the enclosed Petition for a Writ of Certiorari on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage pre-paid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:
Thomas M . Gonzalez, Esquire
Jason L. Odom, Esquire

Thompson, Sizemore & Gonzalez, P.A.
501 E. Kennedy Blvd., Suite 1400
Tampa, FL 33602

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 24, 2003.



DEBORAH A. MAYS, *Petitioner, Pro Se*